

40. 19
February 21. 1771.

A N S W E R S

F O R

JOHN ADAM architect, James Kerr Writer in Edinburgh,
James M'Kenzie goldsmith in Edinburgh, and others;

T O T H E

PETITION of JOHN ANDREW merchant in Edinburgh, John
Baird Farmer in Lochend, and Walter Mitchell farmer at Mor-
ton.

TH E respondent Mr Adam having been long sensible of the justice of a complaint made by almost every stranger who had occasion to come to the city of Edinburgh, that the accesses to it were few, and that most of those accesses, either from their natural situation, or from a neglect of police, were extremely dirty and offensive; it occurred to him, several years ago, that the purchasing ground for the purpose of building houses in some of the out-corners of the suburbs might be of advantage to the public, and be likewise attended with considerable profit to the undertaker.

With this view, Mr Adam made several different purchases; particularly Ross-park upon the south and south-east avenue to the city; and Highriggs and Crichen's gardens upon the west and
A south-

south west ; and formed a plan of building a square in Ross-park, and of opening a communication and useful passage from the great west road, all along the back of the city on the south side.

Particular circumstances did, however, prevent Mr Adam from carrying this plan into immediate execution ; he therefore disposed of Ross park to Mr James Brown, who, in the space of a few years, has built there a great number of elegant houses that are now inhabited by people of rank and fashion.

This improvement upon Ross-park induced the trustees of the turnpike roads to think of widening and improving the highway running along the south of the town-wall, and leading by Lauriston to the Twopenny custom ; and, in order to render this road still more convenient, they applied to Mr Adam for liberty to carry it through his property of Crichen's gardens, so as at once to communicate both with the south and west roads.

This Mr Adams readily consented to, and having, at the same time, projected an additional road through these gardens to communicate with the new road to be made by the trustees, and the south road at Tollcross, he found that he could divide his property into nine different plots for building houses, with a sufficient space for a garden, or a little bit of pleasure-ground, behind each house.

In consequence of this scheme, Mr Adam made out a plan of the ground in the manner he proposed to subdivide it ; and in a very short time disposed of the most part of it to different persons at the agreed price of L. 140 per acre ; and particularly to James Ker writer in Edinburgh, James M'Kenzie goldsmith there, John Tod merchant there, John Dove Wright there, John Straton brewer at Portsburgh, Dun wright at Portsburgh, and James Weir wright at Tollcross.

As it was perfectly understood that those purchases were made for the sole purpose of erecting houses, all the purchasers rested upon obligatory missives from Mr Adam, and no disposition has hitherto been given, until all matters respecting the road to be made at the expence of the purchasers, and other matters of police

lice amongst them, should be regulated. But, in the mean time, several of the purchasers set to work with their buildings, some of them for sale others for private accommodation and the benefit of air, as necessary to their health. Mr Kerr has a valuable and commodious house on the lot No 5. which was slated in August 1768, and he entered to the possession of it at last Whitsunday. Mr Dove has built several houses upon the plot No 8. most of which are also inhabited. Mr M'Kenzie has likewise built a house upon plot No 3. and the other purchasers were in full preparation to begin their buildings early last season, had they not been deterred by the scheme the petitioners had formed of converting a part of the ground which they had got into their possession into a receptacle for the dung and filth that is raked every morning from the streets of Edinburgh.

The plots No 1. 2. 6. 7. had been purchased by William Mason seedsmen at Dalry; but, his scheme of building being defeated by a cross accident, Mr Adam readily agreed to free him of the bargain, and soon found other purchasers ready to take it off his hands. One of these lots, viz. No 2. was accordingly purchased by John Andrew merchant in Edinburgh, and the bargain with him was settled by two missive letters, as set forth in the petition. It soon however appeared, that Mr Andrew was only a nominal purchaser, and that he had bought this lot for the behoof of the two other petitioners, John Baird and Andrew Mitchell, farmers in the neighbourhood of Edinburgh, and ingrossers of the city dung; and as the only view they had in making this purchase was to convert it into a receptacle for keeping that dung until it should grow putrid and corrupt, they marked out no less than *twenty one* different midding-steads, and had four of them filled in a very short time.

As this plan was altogether inconsistent with the original scheme, and, in the event of its being carried into execution, must have proved totally destructive to the property of the other persons who had purchased lots from Mr Adam, a joint complaint was preferred to the sheriff in his and their name, and likewise in the name of the procurator-fiscal, for his interest, wherein they prayed the

the sheriff to discharge the leading and putting any more filth upon the plot purchased by Mr Andrew, and to ordain him, and those who might pretend right from him, instantly to remove the dung and filth which they had laid thereon, and also to find them liable in L. 20 Sterling of damages and expences.

To this complaint, answers were made by the said John Andrew, and replies for the respondents; and, upon the 24th of February 1770, the sheriff pronounced the following interlocutor: 'The sheriff having considered the petition, answers, and replies, with the plan produced, finds, That the plot in question, purchased from Mr Adams, cannot be employed to the purpose of laying dunghills upon it; therefore ordains the dunghills to be removed, and prohibits and discharges any more to be laid on in time coming.'

Upon this Messrs Andrew Baird and Mitchel applied for, and obtained letters of advocation; and, the cause having come in course before the Lord Ellick Ordinary, his Lordship was pleased, upon the 14th of July last, 'to repel the reasons of advocation, and to remit the cause to the sheriff in common form;' and to this interlocutor his Lordship adhered upon the 26th of January last, after advising a representation and answers.

Messrs Andrew, Baird, and Mitchel have thought proper to submit these interlocutors to your Lordships review; and, their petition having been appointed to be seen, these answers are humbly offered upon the part of Mr Adam, and the other respondents who have purchased lots from him.

In the entrance, it may be observed, that the present question is of the utmost importance to the respondents, but is of very little consequence to the petitioners; for it comes entirely to this, Whether the petitioners shall seek out some other place where there are no buildings erected, for a receptacle for the dung and excrementitious filth of this large and populous city, (which they may easily find, as many spots proper for that purpose may be got at no great distance); or whether the respondents, who have already expended several thousand pounds in building houses, and laying out pleasure-ground, in what will now be one of the principal avenues

nues to the metropolis, shall forfeit their properties altogether? for certain it is, that, if the petitioners are suffered to carry their scheme into execution, these properties must be rendered totally useless and unfit for habitation.

The argument in law which is maintained in the petition seems to resolve intirely into this, That it is an established principle founded on the very nature of property, and in the rights of mankind, that every person is intitled to use his property for every lawful purpose, in the manner that shall appear to him to be most agreeable and beneficial, with this single exception, that he does not use it *in emulationem vicini*; and, in support of this argument, the petitioners appeal to a passage from Lord Bankton, and to several decisions of this court.

The respondents are under no necessity of disputing this proposition. If your Lordships shall be of opinion that the petitioners, by converting the lot purchased by them into a receptacle for the dung and filth of the city of Edinburgh, where it is to remain for the space of several months, until it become perfectly putrid and corrupt, are using their property for a lawful purpose, the petitioners must submit; but if, on the other hand, your Lordships shall be of opinion, that it is not a lawful purpose to exercise it in that manner. the respondents will prevail, and the petitioners proposition will, at the same time, remain inviolate. If the purpose itself is not lawful, your Lordships will not require it of the respondents to prove, that it is done *in emulationem vicini*.

The petitioners themselves admit, that public nuisances may be restrained, even although the using one's property in that manner might be more beneficial and advantageous to the proprietor; but then they contend, that it is not quite easy to define what are such public nuisances; that it would require well to be considered before a dunghill, even in a populous city, was declared a nuisance; that, on the contrary, as there must be numbers of cattle in every great town, numbers of dunghills must be absolutely necessary; and that it would still be going a great deal further to declare a dunghill, in the ground belonging to them, a public nuisance,

fance, as such ground does not lie within the city, but falls entirely to be considered as a rural tenement, and was purchased by the petitioners as such.

But, in answer to this plea, the respondents, in the *first* place, beg leave to observe, that, as the petitioners do not pretend to deny their knowledge that the ground, which Mr Adam had divided into nine different lots, was so parcelled out for the purpose of building convenient and agreeable habitations, with small gardens, or spots of pleasure ground, behind them; so it was most fraudulent in the petitioners, Baird and Mitchell, to endeavour, by the interposition of a third party, to attempt to make a purchase of any of these lots, for a purpose so inconsistent with and destructive of the general plan and original design; and it is submitted to your Lordships, that the petitioners, by acting in this hidden and secret manner, and concealing the views they had in making the purchase, must be effectually barred in law from applying the lot bought by them to the purpose for which they now contend. The contract of sale is a *bona fide* contract; the lot in question was sold to Mr Andrew, upon the faith and belief that it was to be applied to the same use with the other lots; and therefore equity will not allow those, for whom he made the purchase, to apply it to a purpose so destructive to the original design of which they were in the perfect knowledge at the time, and so prejudicial to the valuable properties which were then erected, or were carrying on, upon the other lots then disposed of, when they must admit, that, if they had fairly spoke out their intentions, they would not have got an inch of it at any rate.

The petitioners do now indeed (though for the first time since the commencement of the process) alledge, that Mr Andrew bought the ground in question intirely for his own behoof, without any commission from Mess. Baird and Mitchell, and with a view to make profit of it by selling it again; and that he accordingly did offer to sell his purchase to some of the respondents themselves, before he entered into a bargain with the other petitioners Mess. Baird and Mitchell; but, for the said averments, there is no manner

ner of foundation; and that he originally purchased this lot for the behoof of his associates, Baird and Mitchell, is proved in the most direct terms, by his own missive of the 10th of January 1770, recited in the second page of the petition; and it is in vain that he now endeavours to evade his own acknowledgement, by saying, that, as his right depended upon a missive letter, a conveyance to which would have made an exceeding awkward figure, it was thought that the most eligible method of transferring that right was by a declaration of trust. It is true indeed, that the respondents, how soon they got notice of the use to which Mr Andrew and his constituents meant to apply the purchase made by him, did come to a resolution amongst themselves, rather than enter into a law-suit, to offer him a sum equal to what they supposed the expence of such law-suit might amount to, upon his quitting his purchase; and did accordingly authorize one of their number to offer him twenty guineas; but, as he was only a name for the other petitioners, he rejected this offer, which he could not accept, and made over his right to the other petitioners without receiving any profit to himself whatever.

In the next place, as the petitioners admit that no man can convert his property into a public nuisance; so no greater nuisance can well be supposed than the laying down, in the neighbourhood of a great city, and in the very midst of valuable houses, the dung and excrementitious filth produced from many thousand inhabitants in order to rot and corrupt before it be carried away for the purpose of manuring other grounds. The respondents are advised, that the public officers who have the charge of the police, would of themselves have a good right to remove such nuisance from any of the avenues to the city, even though no private party were to complain. The numerous midding-heap which were to be seen some time ago, upon the side of the road from the Two-penny custom to the Fountain-bridge, were much complained of by persons who had occasion to travel that way. These are now almost totally removed, and that avenue to the city is become agreeable:

But

But it will be to little purpose to clear one avenue, if another is to be made equally disagreeable and nauseous.

Our neighbours on the other side of the Tweed, whose law does not, like ours, depend upon general principles of equity and common reason, but almost intirely upon acts of parliament, did very early see the impropriety of allowing any such nuisances in the neighbourhood of cities or great towns. As far back as the days of Richard II. a statute passed, appointing proclamation to be made in London, and in other cities, boroughs, and towns, that all they who cast dung, garbage, intrals, and other ordure in ditches, rivers, waters, and other places, within, about, or nigh unto the cities, boroughs, and towns of the realm, and the suburbs of them should cause the same to be utterly removed, under the forfeiture of L. 20 each; allowing the mayors, and bailiffs to compel the same to be done; and enacting, that all who should be guilty in time to come, should be called by writ before the Lord Chancellor at his suit that would complain, and, if found guilty, should be punished at the discretion of the Chancellor.

This statute is the 13th of the 12th of Richard II. and is entitled, 'The punishment of them which cause corruption near a 'great city, or great town, to corrupt the air.' And it cannot admit of a doubt, that the magistrates of this country must have the same power of compelling every person who is guilty of the like offences to remove any dung or filth laid down by him, which must be attended with consequences so hurtful, not only to individuals, but to the public.

The matter however does not rest here; as, whatever may be the interest of the public, the respondents as individuals have a right to insist, that the nuisance which annoys their property be removed; for, although they admit that every person may apply what is his own to every lawful use, they are advised, that no law whatever will permit a proprietor to apply it to an use that is altogether destructive of the property of his neighbour, or that falls under the idea of a public nuisance.

Nor

Nor is it to the purpose to alledge, that dung-hills are necessary even in populous cities. It is, no doubt true, that stablers and others who keep horses must lay down the dung of their horses at their stable doors, or in their court yards, until it is carted away. But such dunghills give little or no offence, and are of a very different nature from that nuisance to which the petitioners are endeavouring to subject the respondents. The petitioners themselves admit, that they propose to use their ground as a receptacle for the city dung, which is to be stored up there till the season come for laying it upon the ground; and, whether so great a number of midding-steeds, containing all the rakings of the streets and excrementitious filth of a populous city, stowed up in the neighbourhood of valuable houses, where it is to lie for months together, or untill it become quite putrid and corrupt, must be considered as the greatest nuisance possible to be imagined, every person may easily judge. It is indeed perfectly obvious, that so immense a collection of excrement, dung, and other filth, stored up in one place, to ripen through the summer, and to be laid upon land, chiefly after harvest, must not only be attended with the most loathsome and nauseous stench, and of course prove highly detrimental to the health of the neighbourhood, but must likewise, by the quantity of vermine necessarily ingendred in such stuff, prove absolutely destructive to the garden-crops of almost every kind. Besides, the dung of a stable is a necessary evil; but it is by no means necessary that a few farmers should ingross the city-dung, or that these farmers should store up that dung in places destined for building, and under the nose of persons who have laid out considerable sums of money in erecting commodious houses for their own habitations, or for sale.

The petitioners, sensible of this, have endeavoured to impose upon your Lordships. They alledge, that at the time when they purchased this ground, it was a very sequestered spot, lying close by the rubbish of an old quarry; that there was not a building near it, excepting Mr Moncrieff's ice-house, and another small build-

ing, both of which were at a considerable distance; and, in support of this averment, they refer to the plan in process, which they likewise observe does not limit the purposes to which the ground was to be applied, and is accordingly intitled, not " plan of lots to be disposed of for building," but " plan of Crichen's gardens."

But it is of no consequence, that in the plan there are no buildings delineated on the south of the road, excepting the two mentioned by the petitioners. It was not the business of the framer of that plan to delineate houses. All he had to do was to divide the ground, and stake out the road, agreeably to the orders he received from Mr Adam; and, though it could not be expected that all the other plots were to be occupied with buildings, when Mr Andrew purchased N^o 2. yet he could not fail to see, that Mr Kerr's house was finished on plot N^o 5.; that Mr Dove had also built several houses on plot N^o 8.; and that Mr M'Kenzie was then finishing a house upon plot N^o 3. within 30 feet of the places which the petitioners have destined for their middensleads; and, although the other purchasers may not yet have completed their buildings, yet the petitioners well know that all of their purchases were made with that view.

Neither will it avail the petitioners to consider the lot purchased by them as a rural tenement. It is, indeed, situated without the walls, but it is in the midst of valuable property, and upon the side of a public high-way, which will now become one of the most resorted approaches to the city; and the petitioners might, with the same propriety, maintain, that they were intitled to purchase some lots in the new square building in Ross park, and use it for a receptacle for the whole dung of the city, upon the pretence of its being a rural tenement.

With regard to the quotation from Lord Bankton, and the decision quoted from Hope, the respondents are at a loss to discover the application of them to the present case. No person can be prevented from building on his own ground, either in a populous city or in its neighbourhood, although, by so doing, he may intirely darken

darken his neighbour's house; because building is the natural use of such grounds; and the person who built before him must have laid his account with such inconveniency. But the use to which the petitioners are endeavouring to apply their purchase, instead of being a natural use, is most unnatural, and could never be in the view of the respondents when they made their purchases. If, indeed, the petitioners property had been applied to this use prior to the respondents making their purchases, the petitioners might have some plausible pretence for maintaining, that the respondents had it not in their power to prevent them from continuing to exercise their property in the manner they had formerly done; and this may serve as an answer to what is said in the petition, that, in other avenues to the city where houses have been lately built, or may be soon erected, the city-dung is stored up in the same way. But the case here is very different: The ground in question had never formerly been employed to such purposes; and, as the respondents never could imagine that any person would think of employing it in that way, they have a right to insist that a stop be put to the petitioners scheme of converting it to so offensive and disagreeable a nuisance.

Neither are the decisions referred to by the petitioners in the least applicable to the present question.

In the case of Sir Robert Gordon, it was very properly pleaded for Mr Grant of Knockando, that muirburn was an universal and indeed necessary exercise of property in that part of the country, and was accordingly tolerated by law; and that Sir Robert Gordon, who could not be ignorant of this legal toleration, had himself alone to blame for exposing his property to hazard from this universal and necessary practice, by planting or building on the very marches of the neighbouring heaths: But receptacles for the dung or filth of a populous city are neither universal nor necessary in the midst of dwelling-houses. There is therefore no connection whatever between the two cases.

The case of Gordon against Clark is as little to the purpose as the former. A house of office is a necessary and ordinary building;

ing; and, as every proprietor must be at liberty to erect one upon his own ground, it would have been highly absurd to have found such building a nuisance. Indeed 500 of them would not produce so disagreeable and hurtful effects as the petitioners middensteads. But if Mr Clark, from views of profit, had chosen to make his garden a receptacle for the whole filth even of the small burgh of Kircudbright, which would not be equal to one tenth part of the collection from any quarter of the city of Edinburgh, the respondents are persuaded your Lordships would not have suffered such nuisance to remain.

It is equally in vain that the petitioners appeal to the decision between Mr Dewar of Vougie and Mr William Frazer. Mr Dewar, by erecting a draw kiln upon his own grounds, did no more than what any proprietor of land is intitled to do for the purpose of improving his estate. And, although Mr Frazer's house, by being situated upon the very march, was exposed at times to the fumes arising from that kiln, there was no help for it; and it behoved him to submit to the inconveniency. But, if Mr Dewar had thought proper to erect a draw kiln at one of the inlets to the town of Edinburgh, for the purpose of burning lime, to be carried from thence to his estate in the country, or to be sold to others, it is, with all submission, apprehended, that the neighbouring proprietors who had either built houses, or had purchased small spots of ground for that purpose, would have been well intitled to insist that such operations should be prohibited as a public nuisance. Such draw-kiln could not, however, be attended with consequences half so disagreeable or destructive to the respondents property, as that receptacle of filth with which they are now annoyed.

The petitioners have indeed been pleased to observe, that receptacles for the cleanings of the streets and the other rubbish and filth produced within the town of Edinburgh are absolutely necessary in point of police, that it is even requisite that there should be such receptacles in the neighbourhood of the city, as, without them, the streets could not be regularly cleaned; and that a more proper spot

spot than the one in question could hardly be thought of for such a purpose, as, from its natural situation, it was as disagreeable as in the state of a dunghill, by reason of the ditch that drains Hope-park running along one end of it, from whence such a quantity of putrid water flows as to be infinitely more loathsome and disagreeable than any dunghill; a fact, of which it is said the experience of a few minutes will give conviction to any person who, in hot weather, will take a walk to the east end of the Meadow. These observations, however, can have no influence upon the question. The respondents do not mean to throw any impediment, either in the way of cultivation, or in the cleansing of the streets of Edinburgh; they are not endeavouring to deprive the petitioners of the privilege of storing up their dung in a proper receptacle; they only insist that the petitioners shall not apply to that purpose a piece of ground which never was used in that way before, and which, by being one of nine plots set apart for the building of houses, lies now in the midst of a very valuable property, which would be altogether rendered useless, were the petitioners to be indulged in their present scheme. The respondents have no objection to the farmers in the neighbourhood of Edinburgh having as many middings as they please; but let those be upon the farms, for the manuring of which they were intended; or, if it is necessary, that the ingrossers of the city-dung should have a common receptacle, where it may be allowed to rot, and become putrid before it is carried off to be laid upon the ground, let not that receptacle be in the very end of the city, or in the midst of high-priced houses, and valuable properties. Let it be made where it will be less offensive, and less hurtful in its consequences. There it will equally answer the purposes both of cultivation and of cleaning the streets in a regular manner. And indeed the petitioners might, with the same propriety, plead, that they could have marked out 21 middingsteads on that new built area on the south of Brown's-square, in the Society, or in the old Bowling-green, which forms part of Argyle's-square, if they had purchased any part of these areas before they were compleatly built upon, as that they have a right to

D

dispose

dispose of the lott they have purchased in Cric. 1's gardens for that purpose. For, with regard to what is said of the natural situation of the place, the petitioners observations are neither true nor conclusive. It is indeed true, that, before the drains were improved, the ditches, at the east end of Hope-park, were exceedingly nauseous; but there never was any complaint of that kind, on the west end. On the contrary, when the water that is drained from the meadows comes the length of the respondents property, it is so purified as to be fit for most uses. It is generally used for washing and bleaching. And, instead of being nauseous, the respondents would be at an infinite loss, if they wanted it at the foot of their ground. But, even supposing the situation of the respondent's property to be, by nature, disagreeable, the only consequence that can thence be drawn, is, that they have the greater reason to object to its being rendered more disagreeable and offensive by the petitioner's subjecting them to an additional nuisance.

The petitioners seem to complain of the respondents, for alledging, that there are no less than 21 dunghill steeds marked out on this plot of ground; and they aver, that there are no more than four used; that these are at the greatest possible distance that the plot allows of from the buildings, and from the public road; and that they are themselves building houses on this very plot, betwixt these dunghills and the road, which must be more affected by them than the property of any of the neighbours whatever.

But here the petitioners are endeavouring to mislead your Lordships. It is a certain fact, that no less than 21 middling-steeds were marked out, nor has that fact been denied. And the whole not being filled was entirely owing to the respondents bringing their complaint in time before the sheriff. The petitioners would, no doubt, chuse, during the dependence of this process, to render appearances as little disagreeable as possible. And they likewise know, that several persons, to whom they had granted stations for midding steeds, rather chose to give them up, than to join in the expence of the present litigation, and be the instrument of injuring

ing those whose property lay so contiguous. Nor, is it true, that the petitioners are themselves building houses upon the plot purchased by them. They have, indeed, founded a wall or dyke upon the side of the road and the dunghills are brought close to this dyke, but no houses whatever have been built by them, nor can they possibly expect to profit themselves by building houses, while such a nuisance remains in the neighbourhood.

The respondents think it unnecessary to detain your Lordships longer upon a point that seems to them so extremely clear. And they are fully persuaded, that, when you consider the insidious manner which Messrs Baird and Mitchell made use of, in order to get the possession of the ground in question, that they are now endeavouring to apply it to an use absolutely inconsistent with the plan upon which the respondents made their several purchases, and to convert it to a purpose to which it never was formerly applied, and which must be totally ruinous and destructive to the valuable properties in the neighbourhood, you will have no difficulty of adhering to the Lord Ordinary's interlocutor.

In respect, whereof, &c.

ALEX. WIGHT,

*Copies of a sketch or plan referred to in the
petition & answers will be distributed among the
Lords before advising the Chancery*